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No. 75-422

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNATIONAL ENGINEERING COMPANY, ETC., PETITIONER

v.

DONALD H. RUMSFELD
SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
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Petitioner contends that the court of appeals erred in holding that this action arose out of a breach of contract and was cognizable only in the Court of Claims.

On July 7, 1969, the Air Force entered into a contract with petitioner International Engineering Company for the design, construction, and testing of a model of a long-range navigation bomb/missile guidance system, the performance of certain laboratory and helicopter flight tests, and the delivery of a final report analyzing the results of the tests (Pet. App. A-1 to A-2). Pursuant to the Armed Services Procurement Regulations ("ASPR"), 32 C.F.R. 1.100, *et seq.*, the contracting officer incorporated by reference in the agreement some 44 standardized ASPR contractual provisions, including the standard "Rights in Technical Data" clause, ASPR 7.104-9(a), and the "disputes" clause, ASPR 7.103-12, which

establishes a mechanism for resolving contractual disagreements (Pet. App. A-2).

In March 1971, the Air Force requested that petitioner provide further information required under the contract concerning the components and processes of the system in order to facilitate evaluation of the test results (Pet. App. A-2). Petitioner submitted this data both in an interim report and in final report No. 70-06-4. Pursuant to the procedure established by the Rights in Technical Data clause, both reports bore a "limited rights" legend, which, if justifiably affixed, would have prevented the Air Force from disseminating this information to any person not within the government (Pet. App. A-2). The contracting officer questioned the propriety of the legend and requested that petitionner furnish substantiating information, as required by that contractual provision.[1] Petitioner responded that the unit incorporating its alleged trade secrets had been developed at its own expense and that it therefore possessed the right to limit distribution of that information (Pet. App. A-2).

On December 10, 1971, petitioner submitted its final report No. 71-09 under the last modification of the contract. This report contained a limited rights legend with regard to the same data as before (Pet. App. A-3). The contracting officer notified petitioner that pursuant to the Rights in Technical Data clause, the report would not be accepted unless petitioner either removed or substantiated its

[1]The Rights in Technical Data clause places the burden of substantiating the propriety of restrictive legends on the contractor since all pertinent records are in its possession and many important details concerning the development of proprietary information are known only to its employees (Pet. App. A-5, n. 2).

proprietary markings (Pet. App. A-3). After lengthy correspondence and a series of meetings, the contracting officer found that the statements submitted by petitioner had not substantiated the propriety of the legend (Pet. App. A-4 to A-5).[2]

On the day after it was informed of this decision, petitioner instituted this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief from the contracting officer's decision. Petitioner alleged that that decision constituted final agency action reviewable under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702 ("APA"), and that the contracting officer's actions were unlawful (Pet. App. A-5). The district court held that it had jurisdiction over the action and ordered the contracting officer to submit a more detailed explanation of his reasons for determining that the limited rights legend should be deleted (Pet. App. D-1 to D-12). Upon consideration of his report, the district court issued a preliminary injunction prohibiting removal of the legend (Pet. App. B-1 to B-30).

The court of appeals reversed and remanded with instructions to vacate the injunction and dismiss the case for lack of subject matter jurisdiction (Pet. App. A-1 to A-15). Concluding that, in essence, the complaint stated a claim for breach of contract (Pet. App. A-9), the court held that the decision of the contracting officer did not constitute agency action and that the waiver of sovereign immunity contained in the APA was therefore inapplicable (Pet. App. A-12 to A-13). It reasoned that a finding

[2]The Air Force agreed to treat the data as if it possessed limited rights, pending the district court's ruling on the motion for a preliminary injunction.

that the APA applied under these circumstances would significantly impair the jurisdiction of the Court of Claims (Pet. App. A-9). The court further held that under 5 U.S.C. 704, the district court in any event lacked jurisdiction because petitioner possessed an adequate remedy in another court (Pet. App. A-14). The court of appeals therefore concluded that petitioner's sole remedy was to file suit in the Court of Claims under the Tucker Act.

1. The United States cannot be sued without its consent, but when Congress elects to waive its sovereign immunity, that consent may be subject to appropriate conditions. *United States* v. *Sherwood*, 312 U.S. 584. Under the Tucker Act, 28 U.S.C. 1346(a) and 1491, the United States has submitted to suit in contract actions under limited circumstances. The Court of Claims and the district courts have concurrent jurisdiction over claims of less than $10,000;[3] but the Court of Claims has exclusive jurisdiction of claims for over $10,000. Its jurisdiction is limited to the award of monetary damages; it may grant neither injunctive nor declaratory relief. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *King*, 395 U.S. 1.

The court of appeals correctly determined that this litigation is an action for breach of contract, whose resolution requires interpretation of clauses in the underlying agreement to determine the government's rights to certain

[3]Although a district court has jurisdition to adjudicate contract claims of less than $10,000, in exercising that jurisdiction, it lacks authority to consider requests for declaratory and injunctive relief. *Richardson* v. *Morris*, 409 U.S. 464, 466.

information (Pet. App. A-9).[4] At issue are the Air Force's rights to allegedly proprietary data initially disclosed to it under a trade secret licensing agreement (Pet. App. A-11, n. 7). The case therefore falls within the Tucker Act and jurisdiction lies in the Court of Claims,[5] not in the district court (Pet. App. A-9 to A-11).[6]

2. Petitioner contends (Pet. 22-24) that the district court had jurisdiction to entertain this action under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702. It argues that the contracting officer's decision to strike the limited rights legend constituted a "sanction" and was therefore "agency action" reviewable in the district court. 5 U.S.C. 551(10)(D), (13). But the court of appeals properly rejected this argument, determining that in enacting the APA, Congress did not intend to enlarge by implication the narrow waiver of sovereign immunity granted by the Tucker Act (Pet. App. A-13).

[4]Petitioner's contention (Pet. 13-14) that the procedures followed by the contracting officer denied it due process is simply an effort to recast its contract claim in constitutional verbiage. This agrument merely restates petitioner's position that the contracting officer's action constituted breach of contract.

[5]Since the verified complaint alleged that the amount in controversy exceeded $10,000, this action could only be brought in the Court of Claims.

[6]Where the government uses another's trade secret beyond the scope of the license, the owner's rights stem from the violation of that agreement. The government may be sued for breach of contract but not in tort under the Federal Tort Claims Act. 28 U.S.C. 2680(h); *Woodbury* v. *United States*, 313 F.2d 291 (C.A. 9); *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145 (C.A. D.C.).

Petitioner has cited no authority supporting its contention that the contracting officer's determination that petitioner had not substantiated the propriety of its restrictive legend was a "sanction" (see Pet. 22). Nor has it pointed to any portion of the legislative history of the APA, or any judicial decision thereunder, that suggests that Congress intended, in enacting the APA, to provide private contractors with a means for avoiding the jurisdiction of the Court of Claims. Other courts that have considered this issue have concluded that Congress did not intend this result. *Warner* v. *Cox*, 487 F.2d 1301, 1306 (C.A. 5); see *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145 (C.A. D.C.). As a matter of statutory construction, absent an express statement of congressional intent, the APA should not be interpreted as modifying the Tucker Act's measured waiver of sovereign immunity or superseding the adminstrative mechanism for adjudicating disputes such as this before the Armed Services Board of Contract Appeals (Pet. App. A-13 to A-14). See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682.

Furthermore, Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, provides that a final agency action for which there is another adequate remedy in any court is not subject to judicial review under the Act. The court below found that the award of damages by the Court of Claims for breach of contract would be an adequate remedy[7] and that the APA therefore did not apply (Pet. App. A-14 to A-15).

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[7]The district court had found that the United States was the only potential purchaser of the alleged proprietary information (Pet. App. A-8 to A-9). The complaint alleges that petitioner offered to sell the data to the Air Force, which indicates that it believed a fair monetary value could be determined (Complaint, para. 62, p. 27). See *Padbloc Company, Inc.* v. *United States*, 161 Ct. Cl. 369.

See *Mohawk Airlines, Inc.* v. *Civil Aeronautics Board*, 329 F.2d 894 (C.A. D.C.).[8] Accordingly, resolution of this case does not require consideration of the question whether the APA waives sovereign immunity; whether it does or not is irrelevant here because the APA by its terms does not apply.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[8]Petitioner alleges (Pet. 12-13) that this decision of the court of appeals is inconsistent with its holding in *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F.2d 935 (C.A. D.C.). Plaintiff instituted that action to enjoin HUD from disclosing sensitive financial information it had previously submitted. The court remanded the action to the district court to determine whether the Freedom of Information Act, 5 U.S.C. 552, or a criminal disclosure statute, 18 U.S.C. 1905, prevented disclosure of confidential information that the agency wished to divulge; and if they were found not to apply, then to balance the interests of the parties to determine what information could be released. That action is patently unrelated to the issues in the instant case. In any event,even a real intra-circuit conflict would not warrant review by this Court.

[9]Furthermore, the question whether suit in an alternative forum affords an "adequate" remedy is in large part factual. Petitioner's contentions (Pet. 14-19) that suit in the Court of Claims would not afford an "adequate" remedy, and that it may be irreparably injured, raise essentially factual issues that do not warrant further review.